

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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RICHARD ALLEN LANCASTER,

Plaintiff,

v.

ROBERT LeGRAND, et al.,

Defendants.

Case No. 3:14-cv-00169-MMD-VPC

ORDER

This is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner. Before the Court is respondents' motion to dismiss the petition. (Dkt. no. 15).

**I. PROCEDURAL HISTORY**

On March 26, 2010, petitioner was convicted, pursuant to a guilty plea, of one count of promotion of a sexual performance of a minor fourteen years of age or older. (Exh. 9.)<sup>1</sup> Petitioner was sentenced to life imprisonment with parole eligibility beginning after five years. (*Id.*) Petitioner did not appeal his judgment of conviction.

On September 19, 2011, petitioner filed a post-conviction habeas petition in the state district court. (Exh. 20.) The petition was dismissed as untimely. (Exh. 37.) Petitioner appealed from the denial of his post-conviction habeas petition. (Exh. 41.) On November 15, 2012, the Nevada Supreme Court entered an order affirming the

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<sup>1</sup>The exhibits referenced in this order are found in the Court's record at dkt. nos. 10-13.

1 dismissal of the habeas petition as untimely. (Exh. 58.) Remittitur issued on December  
2 13, 2012. (Exh. 60.)

3 On April 11, 2012, while the appeal from the denial of petitioner's post-conviction  
4 petition was pending, petitioner filed an original petition for a writ of mandamus in the  
5 Nevada Supreme Court. (Exh. 45.) On July 25, 2012, the Nevada Supreme Court  
6 denied the petition. (Exh. 54.) The notice in lieu of remittitur was issued on August 20,  
7 2012. (Exh. 55.)

8 On May 15, 2012, petitioner filed a second post-conviction habeas petition in the  
9 state district court. (Exh. 47.) The state district court dismissed the petition. (Exh. 52.)  
10 Petitioner did not appeal.

11 On January 28, 2013, petitioner filed a motion to withdraw his guilty plea in the  
12 state district court. (Exh. 63.) The state district court denied petitioner's motion. (Exh.  
13 76.) Petitioner appealed. (Exh. 77.) On January 16, 2014, the Nevada Supreme Court  
14 affirmed the denial of petitioner's motion to withdraw his guilty plea, stating that  
15 consideration on the merits was precluded by laches and petitioner had no excuse for  
16 the delay. (Exh. 91.) Remittitur issued on April 7, 2014. (Exh. 97.)

17 Petitioner dispatched his federal habeas petition to this Court on March 26, 2014.  
18 (Dkt. no. 5.) Petitioner alleges that his counsel was ineffective for failing to inform him  
19 that he had a right to a direct appeal or file an appeal on his behalf. Respondents have  
20 filed a motion to dismiss the petition. (Dkt. no. 15.) Petitioner has filed an opposition to  
21 the motion. (Dkt. no. 17.) Respondents have filed a reply. (Dkt. no. 18.) Petitioner has  
22 filed a motion to expedite a decision on the motion to dismiss. (Dkt. no. 23.)

## 23 **II. DISCUSSION**

24 Respondents argue that the federal petition was untimely filed. The Antiterrorism  
25 and Effective Death Penalty Act (AEDPA) amended the statutes controlling federal  
26 habeas corpus practice to include a one-year statute of limitations on the filing of federal

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1 habeas corpus petitions. With respect to the statute of limitations, the habeas corpus  
 2 statute provides:

3 (d)(1) A 1-year period of limitation shall apply to an application for a writ of  
 4 habeas corpus by a person in custody pursuant to the judgment of a State  
 5 court. The limitation period shall run from the latest of —

6 (A) the date on which the judgment became final by the conclusion  
 7 of direct review or the expiration of the time for seeking such  
 8 review;

9 (B) the date on which the impediment to filing an application  
 10 created by State action in violation of the Constitution or laws of the  
 11 United States is removed, if the applicant was prevented from filing  
 12 by such State action;

13 (C) the date on which the constitutional right asserted was initially  
 14 recognized by the Supreme Court, if the right has been newly  
 15 recognized by the Supreme Court and made retroactively  
 16 applicable to cases on collateral review; or

17 (D) the date on which the factual predicate of the claim or claims  
 18 presented could have been discovered through the exercise of due  
 19 diligence.

20 (2) The time during which a properly filed application for State post-  
 21 conviction or other collateral review with respect to the pertinent judgment  
 22 or claim is pending shall not be counted toward any period of limitations  
 23 under this subsection.

24 28 U.S.C. § 2244(d).

25 For purposes of the AEDPA limitations period, “a judgment becomes ‘final’ in one  
 26 of two ways — either by the conclusion of direct review by the highest court, including  
 27 the United States Supreme Court, to review the judgment, or by the expiration of the  
 28 time to seek such review, again from the highest court from which such direct review  
 could be sought.” *Wixom v. Washington*, 264 F.3d 894, 897 (9<sup>th</sup> Cir. 2001). Once the  
 judgment of conviction becomes final, the petitioner has 365 days to file a federal  
 habeas petition, with tolling of the time for filing during the pendency of a properly filed  
 application for state post-conviction or other collateral review with respect to the  
 pertinent judgment. 28 U.S.C. § 2244(d)(1), (2). A habeas petitioner’s state post-

1 conviction petition, which was rejected by the state court as untimely under the statute  
2 of limitations, is not “properly filed,” within the meaning of the statutory tolling provision  
3 of the AEDPA limitations period. *Pace v. DiGuglielmo*, 544 U.S. 408, 412-16 (2005).

4 A criminal defendant in Nevada has thirty (30) days from the entry of judgment to  
5 file his notice of appeal. Nev. R. App. P. 4(b). If the defendant does not seek direct  
6 review from the highest state court, the conviction becomes final when the time for  
7 seeking such review expires. 28 U.S.C. § 2244(d)(1)(A); *Hemmerle v. Schriro*, 495 F.3d  
8 1069, 1073-74 (9<sup>th</sup> Cir. 2007); *Wixom v. Washington*, 264 F.3d at 898. Once the  
9 judgment of conviction is final, the defendant has one year to file a federal habeas  
10 petition. 28 U.S.C. § 2244(d).

11 In the present case, petitioner’s judgment of conviction was filed on March 26,  
12 2010. (Exh. 9.) Petitioner did not pursue a direct appeal of his judgment of conviction.  
13 Where a petitioner does not appeal from his judgment of conviction, the one-year  
14 AEDPA limitations period begins to run on the date on which the time to seek appeal  
15 expires. 28 U.S.C. § 2244(d)(1)(a); NRAP 4. Thus, petitioner’s conviction became final  
16 on April 26, 2010, which was the deadline for filing a direct appeal from the judgment of  
17 conviction. The one-year AEDPA statute of limitations began to run on April 27, 2010,  
18 and expired on April 27, 2011. The first page of the federal habeas petition indicates  
19 that the petition was dispatched (given to prison staff for mailing) to this Court on March  
20 26, 2014. (Dkt. no. 5 at 1, item 5). This Court deems petitioner’s federal petition to be  
21 filed on March 26, 2014. *See Houston v. Lack*, 487 U.S. 266, 270 (1988) (pursuant to  
22 the “mailbox rule,” federal courts deem the filing date of a document as the date that it  
23 was given to prison officials for mailing). As such, the federal petition was filed well after  
24 the AEDPA statute of limitations had expired.

25 The Court notes that none of petitioner’s post-conviction petitions or motions was  
26 a “properly filed” application for post-conviction relief or other collateral review of the  
27 judgment, and therefore, none of his filings tolled the statute of limitations. *See* 28  
28 U.S.C. § 2244(d)(2). Petitioner’s first state post-conviction habeas petition, which was

1 untimely filed on September 19, 2011, did not statutorily toll the AEDPA statute of  
2 limitations. (Exh. 20.) The state district court denied the petition as untimely. (Exh. 37.)  
3 In the order of affirmance, the Nevada Supreme Court held that petitioner's post-  
4 conviction state habeas petition was untimely pursuant to NRS § 34.726 and that  
5 petitioner failed to demonstrate good cause for the delay in filing his petition. (Exh. 58.)  
6 Because it was untimely under state law, the state post-conviction habeas petition was  
7 not a "properly filed application" that would toll the AEDPA statute of limitations. 28  
8 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*, 544 U.S. at 412-16.

9 On April 11, 2012, petitioner filed an original petition for a writ of mandamus in  
10 the Nevada Supreme Court. (Exh. 45.) The petition challenged the district court's order  
11 denying petitioner's motions for transcripts, and was not a challenge to his conviction or  
12 sentence. (Exhs. 45 & 54.) Therefore, it was not a "properly filed" application for post-  
13 conviction relief or other collateral review of the judgment, and therefore, it did not toll  
14 the statute of limitations. See 28 U.S.C. § 2244(d)(2).

15 Petitioner filed a second state post-conviction habeas petition on May 15, 2012.  
16 (Exh. 47.) Because the petition was untimely filed under state law, the state post-  
17 conviction habeas petition was not a "properly filed application" that would toll the  
18 AEDPA statute of limitations. 28 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*, 544 U.S. at  
19 412-16.

20 On January 28, 2013, petitioner filed a motion to withdraw his guilty plea. (Exh.  
21 63.) The Nevada Supreme Court held that the motion was barred by laches. (Exh. 91.)  
22 Therefore, the motion was not a "properly filed application" that would toll the AEDPA  
23 statute of limitations. 28 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*, 544 U.S. at 412-16.

24 The period of time including April 27, 2010 (the day after petitioner's conviction  
25 became final), up to and including March 26, 2014 (the date petitioner dispatched his  
26 federal habeas petition), is 1,430 days. Because none of this time was statutorily tolled,  
27 the federal habeas petition is untimely and subject to dismissal.

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1       The United States Supreme Court has held that the AEDPA's statute of  
2 limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560  
3 U.S. 631, 645 (2010). The Supreme Court reiterated that "a petitioner is entitled to  
4 equitable tolling only if he shows: '(1) that he has been pursuing his rights diligently, and  
5 (2) that some extraordinary circumstance stood in his way' and prevented timely filing."  
6 *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. at 418). The petitioner  
7 bears the burden of demonstrating that he is entitled to equitable tolling. *Espinoza-*  
8 *Matthews v. California*, 432 F.3d 1021, 1026 (9<sup>th</sup> Cir. 2005). "[A] petitioner must show  
9 that his untimeliness was caused by an external impediment and not by his own lack of  
10 diligence." *Bryant v. Arizona Att. Gen.*, 499 F.3d 1056, 1061 (9<sup>th</sup> Cir. 2007). A petitioner  
11 "must show that some 'external force' caused his untimeliness, rather than mere  
12 'oversight, miscalculation or negligence.'" *Velasquez v. Kirkland*, 639 F.3d 964, 969 (9<sup>th</sup>  
13 Cir. 2011) (quoting *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9<sup>th</sup> Cir. 2009)).  
14 "[A] garden variety claim of excusable neglect . . . such as a simple miscalculation that  
15 leads a [litigant] to miss a filing deadline . . . does not warrant equitable tolling." *Holland*,  
16 560 U.S. at 651-52 (internal quotations omitted). A *pro se* petitioner's lack of legal  
17 knowledge or sophistication is not, by itself, an extraordinary circumstance warranting  
18 tolling. *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006).

19       Petitioner has failed to make any showing that he pursued his rights diligently  
20 and that any extraordinary circumstance prevented him from filing a timely federal  
21 habeas petition. Petitioner alleges that his counsel was ineffective for failing to inform  
22 him that he had a right to a direct appeal or file an appeal on his behalf. However,  
23 petitioner's lack of knowledge as to his appellate right, or his counsel's failure to file an  
24 appeal on his behalf, does not amount to extraordinary circumstances that warrant  
25 tolling. See *id.* Petitioner is not entitled to equitable tolling and the federal petition must  
26 be dismissed as untimely.

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### III. CERTIFICATE OF APPEALABILITY

District courts are required to rule on the certificate of appealability in the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for certificate of appealability to be filed. Rule 11(a). In order to proceed with his appeal, petitioner must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9<sup>th</sup> Cir. 2006). Generally, a petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.* In this case, no reasonable jurist would find this Court’s dismissal of the petition debatable or wrong. The Court therefore denies petitioner a certificate of appealability.

### IV. CONCLUSION

It is therefore ordered that respondents’ motion to dismiss (dkt. no. 15) is granted.


It is further ordered that the petition is dismissed with prejudice as untimely.

It is further ordered that petitioner’s motion to expedite (dkt. no. 23) is denied as moot.

It is further ordered that petitioner is denied a certificate of appealability.

It is further ordered that the Clerk of Court shall enter judgment accordingly.

DATED THIS 7<sup>th</sup> day of August 2015.



MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE